IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.461 OF 1989

1. Jayappa Mariappa Bagar
age about 20 years, Occ: Driver
residing at Vithal Nagar Zopadpatti
Nehru Nagar, Pimpri, Pune.

2. Shankar Nhasu Vadmare,
age 44 years, Occ: Labourer,
residing at Kamgarnagar Zopadpatti,
Pimpri, District: Pune. ...Appellants.

V/s

1. The State of Maharashtra
2. Mariappa Hanumant,
aged 55 years, Occ: Driver,
residing at Kamgar Nagar Zopadpatti,
Pimpri, District - Pune. ...Respondents

Mrs. P.P. Kakade i/b Mrs. A.A. Agarwal for the appellants.

Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 26th October, 2004

ORAL JUDGMENT:

1. Appellants are challenging the Judgment and Order passed by the Additional Sessions Judge, Pune in Sessions Case No.236 of 1988. By the said Judgment and Order dated 27/06/1989, the appellants are held guilty of the offence punishable under sections 451 read with section 34, 376 read with section 511 of the

Indian Penal Code and under section 306 of the Indian Penal Code and they have been sentenced to suffer R.I. for one year, five years and 6 years respectively.

2. Prosecution's case is that the accused and the husband of the prosecutrix were working for one Transport Contractor as drivers on the vehicle owned by the said Transporter. Deceased Chhaya was the second wife of P.W.1 Mariappa and she was residing with him alongwith two sons Hanumant and Tamma and daughter Laxmi in Kamgarnagar Zopadpatti at Pimpri. The house of accused No.2 was situated near their hut. On 02/09/1984, at about 7.30 p.m., when P.W.1 was standing on the road alongwith other drivers, accused Nos. 1 and 2 entered her hut and accused No.1 proposed Chhaya that she should reside with him as his mistress. Chhaya did not accept the proposal and, thereafter, accused No.1 caught-hold of Chhaya and raped her. Chhaya then told accused Nos. 1 and 2 that they should leave the house otherwise she would pour kerosene on herself and set herself on fire. When accused No.1 & 2 did not leave the house, Chhaya doused her clothes with kerosene and set herself on fire. Then she went out of the house towards Mariappa who then extinguished the fire and took her to the Police Station and from there to the Sasoon Hospital.

She narrated the incident to her husband. Her dying declaration was recorded and the offence was registered against the accused. Charge-sheet was filed. The Trial Court convicted the accused on the basis of the evidence adduced by the prosecution. Against the said Judgment and Order, the appellants have preferred this appeal.

3. Prosecution has examined 10 witnesses. P.W 9 - Manik Chintalwar has stated that when the dead body was brought for post mortem, he noticed that there were 85% burn injuries all over the body. P.W.1 - Mariappa Jade has stated that he was working as a driver and he knew accused No.1 since he was also working alongwith him as a driver with L.P. Ladkani. He has stated that on the said date, he was standing on the road alongwith the driver of another truck and, at that time, while he was talking with other driver, Chhaya came out of the house and her clothes were on fire. He extinguished the fire and gave her other clothes. Then he took her to the Police Station and admitted her in the hospital. While he was taking her in the rickshaw, Chhaya told him as to what had transpired. According to him, she has stated that accused No.1 had outraged her modesty and had sexually assaulted her and, therefore, she had set herself on

fire. This witness has been cross-examined at length. He has stated that the house of accused No.2 was adjacent to his hut. It is difficult to believe the statement of P.W.1 because he could have very well seen the said incident which had taken place as the hut of accused No.2 was adjacent to his hut. Further, P.W.1 has stated that the deceased has told him that the accused had outraged her modesty and had sexually assaulted her. The Trial Court, therefore, has convicted the accused under section 376 read with section 511 of the Indian Penal Code. Prosecution has further relied upon the dying declaration of the deceased Chhaya. From the perusal of dying declaration at Exhibit-30, it may be seen that it is not in question and answer form. P.W.3 - Pyarelal had recorded the dying declaration. He was a Special Executive Magistrate from 1984 to 1988. In the dying declaration, she has stated that accused No.1 had attempted to commit rape on her and, thereafter, she had kicked accused No.1 - Jayappa and, thereafter, she told both the accused to leave the house, otherwise she would set herself on fire and when they did not leave the house, she poured kerosene on herself and set herself on fire. From the evidence of P.W.1 and the dying declaration recorded, it is abundantly clear that the accused did not commit rape but attempted to

commit rape on the deceased. The Trial Court, therefore, has rightly held that the appellants are guilty of the offence punishable under section 376 read with section 511 of the Indian Penal Code.

4. However, so far as the conviction under sections 451 and 306 of the Indian Penal Code is concerned, in my view, the prosecution has not proved that the accused have kept the deceased in wrongful confinement and had abetted the commission of the said offence. In the present case, the deceased appears to have set herself on fire. There is no evidence to suggest that either there was any intention or positive act by the accused to instigate or to assist the deceased in committing suicide. The deceased has stated that the accused had molested her and, thereafter, she had threatened the accused that if they did not leave, she would set herself on fire and, thereafter, she poured kerosene on herself and set herself on fire. It, therefore, cannot be said that the accused had instigated or abetted the deceased in committing the suicide. They had no reason to believe that she would commit suicide. From the facts, as have been brought on record, it is clear that the two accused could not have foreseen that such an act on their part would necessarily drive the woman to commit suicide. The

appellants, therefore, cannot be held guilty of the offence under section 306 of the Indian Penal Code and, therefore, the conviction on that ground is liable to be set aside. Similarly, so far as the offence under section 451 of the Indian Penal Code is concerned, it is difficult to say that the deceased was in wrongful confinement of the accused. The deceased was in her own house which was in crowded locality. The house of accused No.2 is at a distance of about 10 feet from the house of the deceased. The husband of the deceased was standing on the road and was talking with other drivers. The appellants had entered the house of the deceased and had attempted to commit rape on her and, thereafter, had left the house. The husband of the deceased Chhaya could very well have seen the said incident. Under the circumstances, therefore, it is difficult to say that the deceased was in wrongful restraint. Accused are, therefore, acquitted of the offence punishable under section 451 of the Indian Penal Code. Appellants - accused, however, are held guilty of the offence punishable under section 376 read with section 511 of the Indian Penal Code. However, the sentence is reduced to the one which they have already undergone.

Accordingly, the following order is passed:-

O R D E R

. Appeal is partly allowed and the appellants are held guilty of the offence punishable under section 376 read with section 511 of the IPC and the sentence is reduced to the period already undergone by the appellants. The appellants, however, are acquitted of the offences punishable under section 451 of the IPC read with section 34 of the IPC and are also acquitted of the offence punishable under section 306 of the IPC.

V.M. KANADE, J.